EVIDENCE – DISCOVERY – Preclusion
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One possible sanction for violation of discovery rules is precluding or limiting the offending party from calling a witness, or the use of evidence or argument in support of or in opposition to a charge or defense. Rule 15.7(a)(1), Ariz. R. Crim. P. However, preclusion of the evidence is rarely an appropriate sanction for a discovery violation. *State v. Towery,* 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996).

> Although preclusion is a listed sanction, it impinges on a defendant's Sixth Amendment right to present witnesses in his own defense. *Taylor v. Illinois*, 484 U.S. 400, 411-15, 108 S.Ct. 646, 654-56, 98 L.Ed.2d 798 (1988); *State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (App.1993). Consequently, preclusion is rarely an appropriate sanction for a discovery violation and should be used only as a last resort. *Delgado*, 174 Ariz. at 257, 848 P.2d at 342.

State v. Valencia, 186 Ariz. 493, 502, 924 P.2d 497, 506 (App. 1996). In determining whether to prohibit the calling of a witness who has not been properly disclosed, the court should consider 1) how vital the precluded witness is to the proponent's case; 2) whether the opposing party will be surprised and prejudiced by the witness's testimony; 3) whether the discovery violation was motivated by bad faith or willfulness; and 4) any other relevant circumstances. *State v. Roque*, 213 Ariz. 193, 210, 141 P.3d 368, 385 (2006) (citing *State v. Fisher,* 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984)). "Prohibiting the calling of a witness should be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice." *State v. Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979).

The absence of bad faith, alone, is not sufficient to avoid preclusion when there is willful misconduct (i.e., an unexplained failure to do what the rules require). *State v.*

Killean, 185 Ariz. 270, 915 P.2d 1225 (1996). In *Killean,* the defense attorney failed to give notice of a defense until he revealed it in his opening statement. *Id*. at 271, 915 P.2d at 1226. The trial court found that defense counsel did not act in bad faith but instead was "dilatory and negligent in not doing what is clearly provided by the Rules of Discovery." *Id*. The trial court allowed Killean to present his defense through his own testimony at trial but precluded admission of documentary evidence to corroborate the defense. In affirming the trial court's actions, the Supreme Court noted that defense counsel, "a certified criminal law specialist with 38 years' experience," offered no explanation for his failure to disclose the evidence and "could not and did not claim ignorance of the requirements of the rules." Therefore, defense counsel acted with "willful misconduct." *Id*. Accordingly, citing *Taylor v. Illinois*, 484 U.S. 400, 416 (1988), the Arizona Supreme Court held that preclusion of the documentary evidence was an appropriate sanction. *Killean,* 185 Ariz. at 271, 915 P.2d at 1226.

Regardless of whether sanctions are imposed, the court may insist on an explanation for a party's failure to comply with a request to identify witnesses prior to trial. *See Taylor v. Illinois,* 484 U.S. 400, 415 (1988). In *Taylor* the defense attempted to introduce a surprise defense witness after trial had begun, and the trial court precluded the witness from testifying. *Id.* at 403-406. The defendant argued that his Sixth Amendment right to present witnesses in his own defense prohibited preclusion of defense witnesses as a sanction for violating a discovery rule, and suggested that the trial court could instead grant a continuance or a mistrial, or impose disciplinary sanctions against defense counsel. *Id.* at 406. The Supreme Court held that preclusion of defense evidence could indeed be an appropriate discovery sanction. *Id.* at 415.

Noting that one purpose of the discovery rule is to minimize the risk of fabricated testimony, the Court said that it was "reasonable to presume that there is something suspect about a defense witness that is not identified until after the 11th hour has passed." *Id*. at 414. Observing that the trial court found the discovery violation "both willful and blatant," the Court found that "the inference that [defense counsel] was deliberately seeking a tactical advantage is inescapable." *Id*. at 416-17. Thus, preclusion of the defense's witness was appropriate. *Id.*

In *Michigan v. Lucas*, 500 U.S. 145 (1991), the Supreme Court held that preclusion of witness evidence under a state rape-shield law was not a *per se* violation of defendant's Sixth Amendment rights. Lucas failed to follow Michigan statutes requiring him to give timely written notice of his intent to present evidence of an alleged rape victim's past sexual conduct with the defendant. *Id.* at 147. Instead, at the start of the trial, defense counsel asked the court to allow him to present evidence of a prior sexual relationship between the defendant and the victim, saying that he knew that to do so would go against the statute. *Id.* The trial court denied the motion and Lucas was found guilty. *Id.* at 148. The Supreme Court recognized that the statute implicated the Sixth Amendment to the extent that it prevented a criminal defendant from presenting relevant evidence. *Id.* at 149. Nevertheless, the Court held that the Sixth Amendment did not *per se* prohibit the courts from applying the preclusion sanction for violating the statute. *Id.* at 152. Preclusion can be justified if a less severe penalty "would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Id.* (quoting *Taylor v. Illinois,* 484 U.S. 400, 413 (1988)). The Court remanded the case for a determination whether preclusion was in fact appropriate in that case.